

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

Dated: August 18, 2011

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re

**MARK TRAINOR
fdba Trainor Auto Sales**

Debtor

THERESA WRIGHT

Plaintiff

vs.

MARK TRAINOR, et al.

Defendants

Case No. 11-10030

Chapter 7

Judge Buchanan

Adversary Case No. 11-01025

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT,
MARK TRAINOR'S MOTION TO QUASH SERVICE; MOTION TO DISMISS
CLAIM AGAINST MARK TRAINOR AUTO SALES FOR LACK OF SUBJECT
MATTER JURISDICTION OR FAILURE TO STATE A CLAIM AND MOTION FOR
MORE DEFINITE STATEMENT OR IN THE ALTERNATIVE MOTION TO
DISMISS FOR FAILURE TO STATE A CLAIM**

Plaintiff, Teresa Wright, asserts causes of action in her complaint (the “Complaint”) against Debtor Defendant Mark Trainor and Trainor Auto Sales for nondischargeability pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(4) relating to a default judgment entered against the Debtor and Trainor Auto Sales by the Butler County Common Pleas Court for conversion and violations of various consumer sales practices under Ohio Revised Code §§ 1345.01-.03. Plaintiff also asserts causes of action for denial of discharge of the Debtor and Trainor Auto Sales pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4)(A) for transfer and/or concealment of two vehicles and for making false statements under oath at the Debtor’s meeting of creditors regarding the disposition of one or more of these vehicles. The Debtor filed a motion to dismiss¹ all claims against Trainor Auto Sales for failure to state a claim and a motion for a more definite statement of Plaintiff’s claim against the Debtor under 11 U.S.C. § 727(a)(4)(A) (the “Section 727(a)(4)(A) Claim”) or, in the alternative, requests that the Section 727(a)(4)(A) Claim against the Debtor be dismissed for failure to state a claim.²

This Court: (i) grants the Debtor’s motion to dismiss all claims against Trainor Auto Sales for failure to state a claim because Trainor Auto Sales is not an individual entitled to received a discharge pursuant to 11 U.S.C. § 727; and, (ii) denies the Debtor’s motion for a more definite statement of Plaintiff’s Section 727(a)(4)(A) Claim and alternative request to dismiss such claim for the reason that the Complaint alleges sufficient facts to raise a reasonable expectation to a claim for relief.

1. Motion To Dismiss All Claims Against Trainor Auto Sales For Failure To State A Claim

The Debtor seeks to dismiss all claims in the Complaint against Trainor Auto Sales for failure to state a claim on the grounds that Trainor Auto Sales is a fictitious name of the Debtor and the Plaintiff failed to comply with applicable state law requirements to commence an action against a fictitious name. A defendant may move to dismiss a complaint for “failure to state a claim upon which relief can be granted” pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (the “Federal Rules”), made applicable to adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). To survive a motion to dismiss pursuant to Federal Rule 12(b)(6), a complaint must contain factual allegations which are

¹ The Debtor also had moved to quash service. The return of service for the original summons issued in this adversary proceeding did not indicate the addresses at which the Debtor and Trainor Auto Sales were served nor was counsel for the Debtor served with a copy of the complaint and summon. Debtor acknowledges in his supplemental memorandum [Docket Number 12] that Plaintiff subsequently served the Debtor and Debtor’s counsel in accordance with the Federal Rules of Bankruptcy Procedure. Accordingly, the Debtor’s motion to quash service is moot.

² The Debtor did not answer or otherwise plead with respect to the 11 U.S.C. §§ 523(a)(2)(A), 523 (a)(4) and 727(a)(2) claims against the Debtor. The majority of courts, however, hold that the filing of a partial motion to dismiss a complaint extends the time for answering the entire complaint and not merely the claims that are the subject of the motion to dismiss. See e.g., *Aslani v. Sparrow Health Sys.*, 2009 U.S. Dist. LEXIS 19867 at *18 n.10 (W.D. Mich. Mar. 12, 2009); *Schenker v. Ocwen Loan Servicing (In re Schenker)*, 2008 Bankr. LEXIS 2784 at *5-6 n.6 (Bankr. S.D. Ohio Sept. 2, 2008).

“enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

The issues of discharge and dischargeability are the core of Plaintiff’s Complaint. Plaintiff maintains that both the Debtor and the Debtor’s business, Trainor Auto Sales, are part of the chapter 7 bankruptcy case because the Debtor’s Notice of Chapter 7 Bankruptcy identifies the Debtor as “Mark T. Trainor fdba Trainor Custom Auto & Cycle, fdba Trainor Auto Sales.” Therefore, Plaintiff asserts that both Mark Trainor and his business Trainor Auto Sales are proper defendants in this adversary proceeding.

Initially, this Court questions whether Mark Trainor and Trainor Auto Sales are separate legal entities. *See Brown Bark II, L.P. v. Coakley*, 188 Ohio App. 3d 179, 189, 934 N.E.2d 991, 999 (Ohio Ct. App. 2010) (“A sole proprietor doing business under a fictitious name thus does not create an entity distinct from the person operating the business. Rather, the individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his obligations.” (internal quotes and citations omitted)). Moreover, only an individual and his or her spouse are eligible to be joint debtors. *See* 11 U.S.C. §302(a). Therefore, Mark Trainor and his business, Trainor Auto Sales, cannot be joint debtors in the instant chapter 7 bankruptcy case. *See In re Korangy*, 1989 Bankr. LEXIS 500 at *9-10 (Bankr. D. Md. 1989) (finding that only the individual debtors and not the debtors’ partnership were debtors notwithstanding that the debtors listed themselves as doing business under the partnership name in their petition and statement of financial affairs).

In any event and regardless of whether Trainor Auto Sales is an entity that may properly be sued in these proceedings, only an *individual* may receive a discharge in a chapter 7 bankruptcy case. *See* 11 U.S.C. §727(a)(1) (“[t]he court shall grant the debtor a discharge, unless- . . . the debtor is not an individual”). Likewise, only debts of an “*individual debtor*” are excepted from discharge under the conditions set forth in 11 U.S.C. §523(a). *See* 11 U.S.C. §523(a). Consequently, the relief sought in the Complaint against the Debtor’s “business,” Trainor Auto Sales, is a nullity either because Mark Trainor and Trainor Auto Sales are one in the same and relief as to one is relief as to both, or because Trainor Auto Sales is not an individual and no discharge can be sought by Trainor Auto Sales or granted by this Court. *See Smith v. Bluegrass Mortg. (In re Bluegrass Mortg. Servs.)*, 2010 Bankr. LEXIS 1799 (Bankr. E.D. Ky. June 11, 2010) (granting motion to dismiss complaint objecting to debtor’s discharge where debtor is corporation not entitled to discharge pursuant to 11 U.S.C. §727). Accordingly, the Complaint fails to state a claim upon which relief can be granted as against Trainor Auto Sales. Therefore, the Debtor’s motion to dismiss such claims is granted.

2. Motion For A More Definite Statement Regarding Plaintiff's Section 727(a)(4)(A) Claim Or Alternative Relief To Dismiss Plaintiff's Section 727(a)(4)(A) Claim For Failure To State A Claim

The Debtor moves for a more definite statement regarding Plaintiff's Section 727(a)(4)(A) Claim or, in the alternative, requests that Plaintiff's Section 727(a)(4)(A) Claim against the Debtor be dismissed for failure to state a claim. To survive a motion to dismiss the Section 727(a)(4)(A) Claim, the Plaintiff must have alleged sufficient facts in the Complaint to establish that "1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor know the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case." *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000). In considering the Debtor's motion to dismiss Plaintiff's Section 727(a)(4)(A) Claim, this Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *cert. denied, Directv, Inc. v. Treesh*, 552 U.S. 1311, 128 S. Ct. 1876, 170 L. Ed. 2d 746 (2008).

The essence of the Plaintiff's Section 727(a)(4)(A) Claim is that that the Debtor ostensibly lied under oath at his creditors' meeting about the circumstances involving the delivery of a 1995 Ford Flatbed truck to alleged creditor M&M Used Cars. The Complaint makes reference to the Debtor's probable claim that the vehicle was repossessed by M&M Used Cars and that the delivery of the vehicle favored M&M Used Cars. *See* Complaint ¶¶ 10-12 and 16-17. These averments in the Complaint suggest that the Debtor's testimony at the Debtor's creditors' meeting and disclosure in the Debtor's statement of financial affairs that the vehicle had been repossessed by M&M Used Cars were untrue.

The Debtor maintains that Plaintiff's Section 727(a)(4)(A) Claim fails because the Debtor disclosed the existence and location of the 1995 Ford Flatbed truck in his petition and statement of financial affairs and because any alleged falsehood surrounding the circumstances of its delivery to M&M Used Cars is not material to the Debtor's bankruptcy case. Plaintiff does not allege in the Complaint that the Debtor failed to disclose the existence of the 1995 Ford Flatbed truck or its location. Rather, Plaintiff asserts in the Complaint that the Debtor gave false testimony at the Debtor's creditors' meeting regarding the conditions under which the 1995 Ford Flatbed truck was transferred to M&M Used Cars. Considering all of the relevant allegations in the Complaint and drawing all reasonable inferences in favor of the Plaintiff, such statements-if true-are materially related to this chapter 7 bankruptcy case. "Materiality does not mean that a significant amount of money is involved; only that the subject matter of the false oath bears a relationship to the bankrupt's estate or concerns the discovery of assets, business dealings, or the existence or disposition of property." *Jahn v. Flemings (In re Flemings)*, 433 B.R. 230, 241 (Bankr. E.D. Tenn. 2010) (finding that debtor's failure to disclose a \$2,500 loan from her mother and the repayment of that loan from the sale of assets two days before the debtor declared bankruptcy was a material false statement warranting denial of discharge under 11 U.S.C.

§727(a)(4)(A)). The circumstances relating to the Debtor's transfer of assets subject to execution under state law on the eve of bankruptcy are material to the administration of the Debtor's bankruptcy case. Motion to dismiss standards do not impose a probability of success requirement at the complaint stage but rather simply require that Plaintiff plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [an entitlement to relief]." *Gold v. Winget (In re NM Holdings Co., LLC)*, 407 B.R. 232, 242 (Bankr. E.D. Mich. 2009) (quoting *Twombly*, 550 U.S. at 556 (citations omitted)). Accordingly, the Debtor's motion to dismiss Plaintiff's Section 727(a)(4)(A) Claim for failure to state a claim is denied.

Similarly, the Debtor's motion for a more definite statement regarding Plaintiff's Section 727(a)(4)(A) Claim is likewise denied. "Motions for more definite statement under Fed.R.Civ.P. 12(e) are generally disfavored in the federal courts." *In re NM Holdings Co., LLC*, 407 B.R. at 242. This Court finds that the Complaint satisfies the pleading requirements of Federal Rule 8(a) in that it provides a short and plain statement of Plaintiff's Section 727(a)(4)(A) Claim. *See Innovative Digital Equip., Inc. v. Quantum Tech., Inc.*, 597 F. Supp. 983, 988 (N.D. Ohio 1984) (denying a Federal Rule 12(e) motion where the defendant was able to discern enough from the complaint to file a Federal Rule 12(b)(6) motion to dismiss and thereby assert that the complaint failed to state a legal claim for which relief could be granted). To the extent that the Debtor requires further information, "[t]he availability of the several varieties of discovery common in federal practice, as well as the availability of pre-trial conference procedures, all may be resorted to by defendant in order to satisfy his desire for particularity." *In re Byrd*, 51 B.R. 649, 652 (Bankr. S.D. Ohio 1985). Accordingly, the Debtor's motion for a more definite statement regarding Plaintiff's Section 727(a)(4)(A) Claim is denied.

WHEREFORE, for the foregoing reasons, this Court: (i) grants the Debtor's motion to dismiss all claims against Trainor Auto Sales for failure to state a claim; and, (ii) denies the Debtor's motion for a more definite statement of Plaintiff's Section 727(a)(4)(A) Claim and alternative request to dismiss Plaintiff's Section 727(a)(4)(A) Claim.

SO ORDERED.

Copies to:
Richard L. Hurchanik, Esq.
Harry B. Zornow, Esq.

###